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11 Attorneys for Plaintiffs and Cross-Defendants Robert Sapien,
12 Mary Kathleen McCarthy, Than Ho, Randy Sekany,
13 Ken Heredia, Teresa Harris, Jon Reger, Moses Serrano,
14 John Mukhar, Dale Dapp, James Atkins, William Buffington
15 and Kirk Pennington

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IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA

SAN JOSE POLICE OFFICERS' ASSOCIATION,
Plaintiff,

v.

CITY OF SAN JOSE AND BOARD OF
ADMINISTRATION FOR THE POLICE AND FIRE
DEPARTMENT RETIREMENT PLAN OF CITY OF
SAN JOSE, and DOES 1-10 inclusive,
Defendants.

AND RELATED CROSS-COMPLAINT
AND CONSOLIDATED ACTIONS.

Case No. 1-12-CV-225926
(and Consolidated Actions 1-12-CV-
225928, 1-12-CV-226570, 1-12-CV-
226574, and 1-12-CV-227864)

DECLARATION OF CHRISTOPHER E.
PLATTEN IN OPPOSITION TO MOTION
FOR SUMMARY ADJUDICATION

Date: June 7, 2013
Time: 9:00 a.m.
Dept: 2
Judge: Hon. Patricia M. Lucas

Trial Date: July 22, 2013

1 I, Christopher E. Platten, say:

2 1. I am one of the attorneys for plaintiffs Robert Saplen, et al., Teresa Harris, et
3 al, and John Mukhar, et al. who are or were members of IAFF Local 230, IFPTE Local 21
4 and Operating Engineers Local No. 3, respectively, unions representing employees of the
5 City of San Jose.

6 2. I represented the International Association of Firefighters Local 230 in a
7 binding interest arbitration proceeding pursuant to San Jose City Charter, Section 1111
8 with the City of San Jose which took place in June 1997 through the end of 1997. In that
9 proceeding George Rios of the San Jose City Attorney's office represented the City of San
10 Jose.

11 3. I was present at a hearing which took place before the interest arbitration
12 panel on June 5, 1997, in which Mr. Rios made the following statements concerning the
13 1961 Police and Fire Department Pension Plan:

- 14 • Page 24:21 – 25:12

15 "Just a word or two about the Police and Fire Department Retirement
16 Plan.

17 The existing plan is an excellent retirement plan for its members. It is a
18 defined benefit plan, which means that the benefits will be given to the
19 employees.

20 It will be given to the employees even if the amount of money that is
21 contributed by the City or the employees is not enough and is not available at
22 the time that the benefits must be paid. The City will cover those costs if, in
23 fact, that were to happen, and hopefully that never will happen.

24 The plan specifically provides that with regard to prior service costs, if
25 there is a new benefit granted, and that there is a prior service cost with
26 regard to that benefit, that the City must pay the prior service cost 100
27 percent.

28 The City is required to pay at least eight-elevenths of all current

1 service contributions.

2 • Page 26:4-16:

3 Retirement benefits are not like other benefits. They are not like
4 wages. They are not like increased sick leave. They are not like increased
5 vacation days or uniform allowance, and they are not like those benefits,
6 because retirement benefits, once given, can never be taken way [sic]. That's
7 not quite absolutely true, because there are some ways to take them way
8 [sic], but you can take them away only if give [sic] a comparable benefit.

9 So once a benefit comes into the retirement plan, it becomes a benefit,
10 then it's there, or you're going to have to give them something else in return
11 later on that's comparable to that, so for all practical purposes, it's there
12 forever."

13 Attached hereto as Exhibit 1 are the front the front pages of pages 24 to 26 of the
14 transcript of that hearing which accurately reflect Mr. Rios's statements.

15 4. In that same interest arbitration Mr. Rios filed with the interest arbitrator and
16 served my office with a copy of the City's Opening Brief in which he made the following
17 statement:

18 • Page 2:10-16

19 "Unlike other employment benefits, such as salary (which may be
20 linked to inflation or the consumer price index), retirement benefits in a
21 defined benefit plan are not subject to the fluctuating economy. Once a
22 retirement benefit has been installed in the retirement plan, the employee
23 who meets the eligibility requirement has a vested right in the benefit upon
24 retirement and it generally cannot be removed from the plan unless a benefit
25 of equal or greater value is given. Betts v. Board of Administration (1977) 21
26 Cal.3d 859; Valdes v. Corey (1983) 139 Cal.App.3d 773."

27 Attached hereto as Exhibit 2 are copies of relevant portions of that Opening Brief.
28

1 5. In his Closing Brief in the same interest arbitration Mr. Rios set forth the
2 following:

- 3 • Page 2:20-21

4 "The City is obligated to the huge risk of this defined benefit
5 plan and being solely responsible for prior service costs, ..."

6 Attached hereto as Exhibit 3 are copies of relevant portions of that Closing Brief.

7 6. In a subsequent brief after the arbitration panel awarded its decisions Mr.
8 Rios filed and served another brief in which he stated:

- 9 • Page 1:23 – 2:4

10 "Under the Plan, benefits are funded by contributions from both the
11 City and the members. Member contributions (excluding those for medical
12 coverage) consist solely of 'current service' costs; City contributions consist
13 of 'current service' costs and also 'prior service' costs. Section 3.36.1520 of
14 the San Jose Municipal Code provides that 'current service' costs 'shall not
15 include any amount required to make up any deficit resulting from the fact
16 that previous rates of contribution made by the City and members were
17 inadequate to fund benefits attributed to service rendered by such members
18 prior to the date of any change of rates,....' Costs related to service rendered
19 prior to the date of any contribution rates changes are allocated to 'prior
20 service' costs which are borne entirely by the City (San Jose Municipal Code
21 Section 3.36.1550)."

22 Attached hereto as Exhibit 4 are copies of relevant portions of that brief.

23 7. In a separate binding interest arbitration pursuant to San Jose City Charter,
24 Section 1111 between Local 230 and the City of San Jose, I attended an arbitration
25 session on June 5, 2007 representing Local 230. Attorney Charles Sakai represented the
26 City. In that hearing Alex Gurza, Director of Employee Relations was asked by the City's
27 Attorney to explain what the SRBR fund (part of the pension plan) was. He outlined what
28 an SRBR was. He then concluded by stating "so that is an additional benefit that our

1 pension provides and it was added in 2001." Mr. Gurza also confirmed that the City was
2 the guarantor of the pension fund benefits. Attached hereto as Exhibit 5 are true and
3 correct copies of relevant portions of the court reporter's transcript of the proceedings on
4 June 5, 2007 which accurately reflect Mr. Gurza's testimony (pgs. 1667:22-1669:5; 1283:2-
5 22)

6 8. In December of 1990 I represented IAFF Local 873 (subsequently renamed
7 Local 230) in a binding interest arbitration with the City of San Jose at which the City
8 presented testimony of Steven T. Itelson, a consulting actuary to the San Jose Police and
9 Fire Retirement Board from 1983 to the date of his testimony. In the course of his
10 presentation he testified as follows:

- 11 • Page 81:15 – 82:5

12 Q: "There has been some discussion here, which you may be able to
13 improve upon, as to the ratio of contributions between the City and the
14 employees and other factors that somehow determine what the ultimate
15 rates are by the City and the employees. First, will you describe the 8-to-3
16 ratio? What is it and how does it work?

17 A: The interpretation of the City Code that we were given was that
18 "current service cost" meant the cost of the Plan for new employees or
19 new participants, and that cost was split in a 8-to 3 ratio. But contributions
20 at that level in the future, together with the assets at that point in time,
21 would not cover the cost of all the benefits. This is the so-called unfunded
22 liability. Whether it is called USVP or UAL or some other actuarial term,
23 the City is fully responsible under the Code for payment of that unfunded
24 liability."

25 Attached hereto as Exhibit 6 are copies of a partial transcript of his testimony.

26 9. In the spring and early summer of 2011, I represented IAFF Local 230, IFPTE
27 Local 21 and OE Local 3 in negotiations with the City of San Jose. As a result of those
28 negotiations each of these unions sustained on behalf of their members a 10% reduction of

1 pay for two years.

2 10. I have personally represented IAFF Local 230 and this law firm has
3 represented Operating Engineers Local Union No. 3 since 1981. I also have represented
4 AEA IFPTE Local 21 since its recognition by the City. During that period of time I have
5 been personally aware of various changes in the 1975 Federated City Employees
6 Retirement Plan and the 1961 Police and Fire Department Retirement Plan. During that
7 period of time there have been no material modifications made to either plan which either
8 increased employee contributions or decreased benefits other than modifications that
9 followed the meet and confer negotiations with the employee unions pursuant to the
10 Meyers-Milias-Brown Act (Gov. Code §§3500 et seq.). During that period of time, the City
11 extended to pre-existing retirees many of the pension benefits enhancements negotiated
12 by three unions for active employees, including for example, payments from the
13 Supplemental Benefit Reserve Funds, COLA's and others. The unions negotiate pension
14 benefit enhancements for active employees and challenge by grievance arbitration or
15 lawsuits City actions which breach contract promises for pension or other post retirement
16 benefits to retired union members.

17 11. Attached hereto as Exhibit 7 is a true and correct copy of a Memorandum
18 from San Jose City Manager Leslie R. White dated November 9, 1990, which was
19 circulated by the San Jose Fire Chief Robert Osby to San Jose Firefighters in November,
20 1990. In the memorandum on page 2 Mr. White states, "When the cost of providing
21 benefits goes up and the benefits must be paid for, the City pays 100% of the unfunded
22 liability (the amount not covered by contributions)".

23 12. I filed unfair practice charges with the California Public Employment Relations
24 Board (PERB) on or about June 4, 2012 in Case No. SF-CE-969-M on behalf of IAFF,
25 Local 230 and on or about August 31, 2012 in Case No. SF-CE-996-M on behalf of IFPTE,
26 Local 21 alleging on both that the City of San Jose had not bargained in good faith to
27 impasse before placing Measure B on the June, 2012 ballot. On or about March 8, 2013,
28 PERB issued complaints on both charges finding a prima facie showing that the City had

1 failed to fulfill its bargaining obligation on Measure B, under the Meyers-Milias-Brown Act
2 and the decision on *Seal Beach Police Officers' Assn v. City of Seal Beach* (1984) 36
3 Cal.3d 591. (See RJN No. 2)

4 I declare under penalty of perjury that the foregoing is true and correct. Executed on
5 May 1, 2013, at San Jose, California.

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7 
8 Christopher E. Platten

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EXHIBIT 1

1 IN ARBITRATION PROCEEDINGS PURSUANT TO THE COLLECTIVE
2 BARGAINING AGREEMENT BETWEEN THE PARTIES
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In the Matter of a Controversy

between

SAN JOSE POLICE OFFICERS ASSOCIATION
and SAN JOSE INTERNATIONAL ASSOCIATION
OF FIREFIGHTERS,

and

CITY OF SAN JOSE,

VOLUME I

BEFORE:

The Arbitration Panel:
BONNIE G. BOGUE, Attorney at Law
DARRELL DEARBORN
KEN HEREDIA

Location:
San Jose Police Officers
Association Office
1151 North First Street
San Jose, California

Date: June 5, 1997

Time: 10:00 a.m.

J. J. Reporting Services

28 North First Street, Suite 202
San Jose, California 95113
(408) 298-4040

J. J. REPORTING SERVICES

1 APPEARANCES:

2 ON BEHALF OF THE UNIONS:

3 Attorney for San Jose Police Officers Association:
4 Mr. John R. Tennant, Esquire
5 CARROLL, BURDICK & McDONOUGH, Attorneys at Law
6 44 Montgomery Street, Suite 400
7 San Francisco, California 94104

8 Attorney for San Jose International Association of
9 Firefighters:

10 Mr. Christopher E. Platten, Esquire
11 WYLIE, MCBRIDE, JESINGER, SURE & PLATTEN
12 101 Park Center Plaza, Suite 900
13 San Jose, California 95113

14 ON BEHALF OF THE EMPLOYER:

15 Attorney for the City of San Jose:
16 Mr. George Rios, Esquire
17 CITY OF SAN JOSE, OFFICE OF CITY ATTORNEY
18 151 West Mission Street
19 San Jose, California 95110

20 ALSO PRESENT:

21 UNION EMPLOYEE REPRESENTATIVES:

22 JIM TOMAINO, President of San Jose Police
23 Officers Association

24 RANDY SEKANY, President, San Jose firefighters

25 DOUG STEWART, San Jose firefighters No. 230

26 JEFF RICKETTS, CFO, San Jose Police Officers
Association

SUSAN TAMAYO, Legal Assistant, CARROLL, BURDICK
& McDONOUGH

MATT ELVANDER, San Jose Police Officers
Association

ROBERT SAPIGN, San Jose Fire Fighter

EMPLOYER REPRESENTATIVES:

ALEX GURRA, Executive Assistant, Employee Relations

LYNN BOLAND, Employee Relations Officer

TIMOTHY S. SPANGLER, Deputy City Attorney

1
2 MR. RIOS: If you'll just
3 give me a minute.

4 ARBITRATOR BOGUE: Sure.

5 MR. RIOS: I'll go ahead and
6 make an opening at this time.

7 ARBITRATOR BOGUE: Okay.

8 OPENING STATEMENT ON BEHALF OF THE CITY

9 MR. RIOS: First of all, I
10 would like to start with the issue of the fact that the
11 City is not making an ability-to-pay argument.

12 And in that regard, I would just like to note that
13 there is fairly clear authority that the fact that we are
14 not making an ability-to-pay argument is not the
15 determinative factor in deciding whether benefits should
16 or should not be granted.

17 The Arbitration Board is required to look at the
18 particular benefit that is sought and to determine with
19 regard to all of the factors in deciding whether or not to
20 grant that particular benefit, whether or not that benefit
21 is justified and is warranted.

22 Just a word or two about the Police and Fire
23 Department Retirement Plan.

24 The existing plan is an excellent retirement plan for
25 its members. It is a defined benefit plan, which means
26 that the benefits will be given to the employees.

It will be given to the employees even if the amount

J. J. REPORTING SERVICES

1 of money that is contributed by the City or the employees
2 is not enough and is not available at the time that the
3 benefits must be paid. The City will cover those costs
4 if, in fact, that were to happen, and hopefully that never
5 will happen.

6 The plan specifically provides that with regard to
7 prior service costs, if there is a new benefit granted,
8 and that there is a prior service cost with regard to that
9 benefit, that the City must pay the prior service cost 100
10 percent.

11 The City is required to pay at least eight-elevenths
12 of all current service contributions.

13 I find it very difficult to believe that Mr. Tennant
14 can say that there may be a point that the City would not
15 have to pay any contribution. Very difficult for me the
16 believe that, but be that as it may.

17 Another point about the retirement system, and that
18 is the retirement system is already set up to deal with
19 inflation. If there are high inflation years, the City
20 salaries are going to increase.

21 Their benefits at retirement are based upon final
22 average salary, so they are going to get something based
23 on their salary at the time they retire, not based upon
24 their salary now and what they're contributing now, unless
25 now is the point that they're going to retire.

26 In addition, the City's plan has a 3 percent cost of
J. J. REPORTING SERVICES

1 living increase maximum for retirees, based on the
2 consumer price index, that is also available to deal with
3 inflation after they retire.

4 Retirement benefits are not like other benefits.
5 They are not like wages. They are not like increased sick
6 leave. They are not like increased vacation days or
7 uniform allowance, and they are not like those benefits,
8 because retirement benefits, once given, can never be
9 taken away. That's not quite absolutely true, because
10 there are some ways to take them away, but you can take
11 them away only if give a comparable benefit.

12 So once a benefit comes into the retirement plan, it
13 becomes a benefit, then it's there, or you're going to
14 have to give them something else in return later on that's
15 comparable to that, so for all practical purposes, it's
16 there forever.

17 Other benefits, for example, wages, if we were to
18 have a catastrophe and not have the money to pay a certain
19 wage level of our employees, those benefits could be
20 reduced. So retirement benefits are really a much
21 different animal, a different kind of benefit.

22 And because we are negotiating retirement benefits
23 and their vested benefits, this arbitration really is
24 about how much more are we going to give?

25 It isn't about, you know, a give-and-take process,
26 you know, what is the City going to get versus what are

EXHIBIT 2

1 JOAN R. GALLO, City Attorney (#65825)
2 GEORGE RIOS, Assistant City Attorney (#77908)
3 TIMOTHY S. SPANGLER, Deputy City Attorney (#168163)
4 Office of the City Attorney
151 West Mission Street
San Jose, California 95110
Telephone: (408) 277-4454

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5 Attorneys for CITY OF SAN JOSE

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7 IN RE: ARBITRATION OF POLICE AND FIRE
8 RETIREMENT
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15 CITY OF SAN JOSE'S OPENING BRIEF
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1 quo. (See Exhibit "A", Brand Award, pages 8-9.¹) Moreover, according to the Brand
2 Award, "[t]he quantum of proof necessary varies with the impact of the proposed
3 change, the cost (or savings) associated with the change, and factors which mitigate
4 these costs or savings". (Exhibit "A", page 8.) Further, Brand stated that "[t]he greater
5 the magnitude and unmitigated cost of a proposed change, the more proof necessary to
6 justify the change". (Exhibit "A", pages 8-9.) Due to the magnitude of several of the
7 changes in the retirement benefits advocated by the UNIONS, the burden of proof on
8 these issues must be carefully weighed in this matter.

9 **3. Retirement Benefits Are Unique And Must Be Carefully Considered.**

10 Unlike other employment benefits, such as salary (which may be linked to
11 inflation or the consumer price index), retirement benefits in a defined benefit plan are
12 not subject to the fluctuating economy. Once a retirement benefit has been installed in
13 the retirement plan, the employee who meets the eligibility requirements has a vested
14 right in the benefit upon retirement and it generally cannot be removed from the plan
15 unless a benefit of equal or greater value is given. Betts v. Board of Administration
16 (1977) 21 Cal.3d 859; Valdes v. Corey (1983) 139 Cal.App.3d 773. Therefore,
17 retirement benefits must be awarded cautiously. When budgetary constraints require, a
18 public agency may choose not to raise salaries (or even to decrease salaries if
19 necessary). However, such cost-cutting measures cannot similarly be undertaken with
20 respect to retirement benefits. Thus, a retirement plan that is blindly generous to
21 retirees could effectively cripple the CITY's budget in the event of an economic
22 downturn.

23 **B. The UNIONS Should Not Be Awarded Any Cost Benefits.**

24 In connection with prior negotiations between the CITY and the UNIONS,
25 including recent negotiations over the regular (non-retirement) Memorandum of
26

27 ¹ Pursuant to Christopher Platten's letter of September 5, 1997, the UNIONS have no objection to the
28 submission of the Norman Brand arbitration award as an additional exhibit in these proceedings. The
award is attached hereto as Exhibit "A".

EXHIBIT 3

1 JOAN R. GALLO, City Attorney (#65875)
2 GEORGE RIOS, Assistant City Attorney (#77908))
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7 IN RE: ARBITRATION OF POLICE AND FIRE
8 RETIREMENT
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15 CITY OF SAN JOSE'S REPLY BRIEF
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1 condition of the City. However, as discussed in detail in the CITY's Opening Brief (at
2 pp. 11-12), Mr. Lowman did not take an actuarially-sound approach in arriving at his
3 conclusions. Briefly stated, in arriving at his conclusion that the CITY's contribution rate
4 will go down by up to 6% following the next valuation, Lowman relied primarily on the
5 risky and speculative practice of considering only one factor, i.e. predicted investment
6 returns. (See Johnson Testimony, Vol. IV, p. 93.)

7 Therefore, despite the UNIONS' characterization, Mr. Johnson clearly does not
8 "essentially concur" with Lowman's assessment regarding future contribution rates. The
9 UNIONS "cut and paste" Mr. Johnson's testimony to serve their purposes. The full text
10 of the portion of Mr. Johnson's testimony quoted by the UNIONS is contained in Table 1
11 attached hereto. This table sets forth numerous instances in which the UNIONS have
12 mischaracterized the evidence in this matter.

13 In any event, the contribution rates are independently set by the Retirement
14 Board, not by the CITY, and will only be modified based on a full actuarial valuation of
15 all relevant factors by the Retirement Board's own actuarial firm. (Overton Testimony,
16 Vol. III, p. 129:8-12; J 10, pp. 14-15; Johnson Testimony, Vol. IV, p. 94:10-12.)

17 With respect to the CITY's past contribution rates, the UNIONS misstate the
18 facts. The rates were increased in 1992 -- (a mere 5, as opposed to 15, years ago).
19 (C 9a.) Further, the CITY's unmatched payments for prior service costs for the fund
20 exceeded \$45,000,000 through 1990. (C 10.) The CITY is obligated to the huge risk of
21 this defined benefit plan and being solely responsible for prior service costs, with no
22 concurrent risk undertaken by its members, thus it is understandable that it is the CITY,
23 through reduced prior service cost payments, that gets the credit of any actuarial
24 surplus generated by the Plan. (See Kagei Award.)

25 Since the CITY acts as a guarantor to the Retirement Plan to ensure the benefits
26 to the members in good times and in bad, the current value of Plan assets are at all
27 relevant to the issues before the Arbitration Board.
28

EXHIBIT 4

1 JOAN R. GALLO, City Attorney (#65875)
2 GEORGE RIOS, Assistant City Attorney (#77908)
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5 Attorneys for CITY OF SAN JOSE

6
7 IN RE: ARBITRATION OF POLICE AND
8 FIRE RETIREMENT BENEFITS

CITY OF SAN JOSE'S OPENING
BRIEF RE: COST OF RETROACTIVE
FUNDING OF THE 80% FINAL
AVERAGE SALARY BENEFIT

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11
12 I. INTRODUCTION

13 In the Decision of the Board of Arbitration dated November 17, 1997, a majority
14 of the Board accepted the Unions' proposal to increase the maximum benefit payable
15 from the Police and Fire Department Retirement Plan (the "Plan"). The Board awarded
16 an increase from 75% of final average salary ("FAS") to 80% of FAS retroactive for all
17 persons who retired on or after February 4, 1996.

18 Under this award, all Plan members who retire between February 4, 1996, and
19 the effective date of the Plan amendment implementing the benefit increase will be
20 eligible to receive a higher retirement benefit. However, the passage of more than two
21 years between those two dates will result in inequitable funding of the retroactive
22 aspect of this benefit.

23 Under the Plan, benefits are funded by contributions from both the City and the
24 members. Member contributions (excluding those for medical coverage) consist solely
25 of "current service" costs; City contributions consist of "current service" costs and also
26 "prior service" costs. Section 3.36.1520 of the San José Municipal Code provides that
27 "current service" costs "shall not include any amount required to make up any deficit
28 resulting from the fact that previous rates of contribution made by the City and members

1 were inadequate to fund benefits attributable to service rendered by such members
2 prior to the date of any change of rates,” Costs related to service rendered prior to
3 the date of any contribution rates changes are allocated to “prior service” costs which
4 are borne entirely by the City (San José Municipal Code Section 3.36.1550).

5 Because Plan members will not have made the “current service” contributions
6 they would have made had the benefit increase and corresponding contribution rate
7 increases been in place as of February 4, 1996, those costs will be shifted to the City,
8 unless an alternative funding mechanism is made a part of the award. According to
9 the actuarial study (which is based upon the 1995 City payroll), the contributions
10 members would have made during this almost two year period is approximately
11 \$600,000.¹ The total amount of these unpaid contributions increases as the period
12 between February 4, 1996, and the effective date of the benefit enhancement
13 lengthens. Thus, without an alternative funding mechanism, the City will pay a
14 disproportionate share of the cost attributable to the retroactivity of the benefit.

15 Therefore, the City requests that the Board include in the award a provision that
16 the amount of the contributions that would have been made by the members had the
17 80% of FAS benefit been implemented and the contribution rates adjusted as of
18 February 4, 1996, be borne by the members and not included in the City's prior service
19 contribution rate, and a provision that the Plan amendment implementing the 80% of
20 FAS benefit so provide. The amount of such contributions will be determined on an
21 actuarial basis and be amortized over the remaining amortization period for the prior
22 service costs.

23 As discussed in detail below, the proposed clarification regarding the retroactivity
24 of the proposed benefit corrects a fundamental inequity and is supported by the
25

26
27 ¹ This figure is derived by multiplying \$109 million (1995 payroll) and .27 (employees' cost of the 80% FAS
28 benefit) and then multiplying the sum by two years (the retroactive period). The employees' cost of the
80% FAS appears on Joint Exhibit 9. It should be noted that the CITY's payroll is now, of course, higher
than the 1995 payroll and, as a result, the actual figure is higher than \$600,000.

EXHIBIT 5

INTEREST ARBITRATION

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COPY

In the Matter of the Controversy
between

INTERNATIONAL ASSOCIATION OF
FIREFIGHTERS, LOCAL 230,

Union,

CSMCS Case No.
ARB-04-3025

and

CITY OF SAN JOSE,

Employer,

Volume 8

Pages 1080 through 1353

Dolce Hayes Mansion
200 Edenvale Avenue
San Jose, California
Friday, January 5, 2007

Met, pursuant to notice, at 9:30 a.m., on the
record at 9:46 a.m.

Before:

JERILOU COSSACK, Arbitrator,
3231 Quandt Road, Lafayette,
California 94549

Reported by KATHERINE L. WAKI, CSR 5666

1 APPEARANCES

2 ON BEHALF OF THE UNION:

3 WYLIE, McBRIDE, JESINGER, PLATTEN & RENNER
4 2125 Canoas Garden Avenue, Suite 120
San Jose, California 95125
5 (408) 979-2920
BY: CHRISTOPHER E. PLATTEN, Esq.

6 ON BEHALF OF THE CITY:

7 RENNE SLOAN HOLTZMAN SAKAI
8 50 California Street, Suite 2300
9 San Francisco, California 94111-4624
(415) 678-3800
10 BY: CHARLES D. SAKAI, Esq.

11 PANEL MEMBERS:

12 ON BEHALF OF THE UNION:

13 RANDY SEKANY
14 President
425 E. Santa Clara Street, Suite 300
15 San Jose, California 95113
(408) 286-8718

16 ON BEHALF OF THE CITY:

17 NORA FRIMANN, Esq.
18 City of San Jose
200 E. Santa Clara Street, T1600
19 San Jose, California 95113
20 (408) 535-1930

1 APPEARANCES (Continued)

2 Also Present:

3 GEORGE RIOS, San Jose City Attorney's Office

4 ALEX GURZA, Director of Employee Relations,
5 City of San Jose

6 ARACELY RODRIQUEZ, Senior Executive Analyst,
7 City of San Jose

8 JILL PLOUGH, Legal Analyst, San Jose City
9 Attorney's Office

10 JIM CARTER, Deputy Chief, Bureau of Field
11 Operations

12 DARRYL VON RAESFELD, Fire Chief, San Jose Fire
13 Department

14 SUZANNE HUTCHINS, Deputy City Attorney, City of
15 San Jose

16 JEFF WELCH, Local 230 Vice President

17 MARK SKEEN, Executive Vice President, San Jose
18 Firefighters

19 JIM BUESSING, Contractor, Wylie, McBride,
20 Jesinger, Platten and Renner

21 ROBERT SAPIGN, Local 230 member

22 KEITH KEESLING, Local 230 Treasurer

23 TERRY OHLSEN, Consultant, Local 230

24 RANDALL HUDGINS, Consultant, Local 230

25 RICH THOMAS, Consultant, Wylie, McBride,
Jesinger, Platten & Renner

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I N D E X

2 AFTERNOON SESSION: 1177

3 CITY WITNESSES

Direct Cross Redirect Recross

4 Alex Gurza

1088 1219
1321

6
7 UNION REBUTTAL
WITNESSES

8 Randall Hudgins

1326 1334

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1 opposed to two-percent COLA. Are there other benefits
2 that San Jose offers to people upon retirement?

3 A. Yes. Our retirement plan, again, it's not like
4 PERS, so it has other issues. There's, obviously,
5 our -- our retiree medical is part of our plan.

6 There's also, like you mentioned, the
7 three percent guaranteed cost of living, which, again,
8 is not the standard.

9 And the other additional benefit that is part
10 of the police and fire plan is what we call a
11 "supplemental retiree reserve fund." And there are
12 hand-outs that describes that, that benefit.

13 MR. SAKAI: And this, I believe, is "C-26."

14 THE ARBITRATOR: Right.

15 Marking as City Exhibit C-26, a packet of
16 documents, the first page of which is a memorandum dated
17 December 4, 2001, addressed to the mayor and the city
18 council.

19 (City Exhibit No. 26-C was marked for
20 identification.)

21 Q. (By MR. SAKAI): And, so, what is the
22 supplemental retiree benefit reserve?

23 A. Well, it's a little complicated to explain.
24 The memo should -- does describe it.

25 It is a program that was added to the police

1 and fire plan. They actually have it in the Federated
2 plan, which is our other pension plan for non-sworn
3 employees.

4 This one functions a little different, but
5 essentially it takes funds in the retirement plan, moves
6 them to what's called a fund, and what it was -- trying
7 to be brief about it -- if the fund earns more than the
8 actuarially-assumed rate, so right now let's say it's
9 eight percent, and the fund earns 10, it takes
10 10 percent of that excess and moves it to this
11 supplemental retiree benefit reserve.

12 THE ARBITRATOR: We talked about this before.

13 THE WITNESS: I don't know if maybe John Bartel
14 mentioned it.

15 THE ARBITRATOR: Yes.

16 THE WITNESS: So what it actually does, the
17 first --

18 THE ARBITRATOR: It's a savings plan.

19 THE WITNESS: Well, not a savings plan. It
20 takes part of what the fund assets are, moves it there,
21 and then the second memo describes the way that it's
22 distributed to retirees.

23 So it ends up, in some places, in some pension
24 plans, it's referred to as a 13th check.

25 In other words, if there's funds available to

1 be distributed, it's based on some formula that usually
2 takes into account years of service and how long you've
3 been retired. And then cuts you a separate check.

4 So that is an additional benefit that our
5 pension plan provides, and it was added in in 2001.

6 MR. SAKAI: And, Madam Arbitrator, cognizant of
7 the time, we're about five minutes 'til we hit a good
8 breaking point.

9 THE ARBITRATOR: Okay.

10 Q. (By MR. SAKAI): Looking at this Slide 20, what
11 is this?

12 A. This is -- because we do have a proposal on
13 sick leave payout, we wanted to demonstrate what our
14 average sick leave payout and vacation payout is,
15 because they are paid out at the time of retirement.

16 So the top one is average sick leave payout.
17 It shows it by rank, and then it shows the average sick
18 leave payout that's paid out at retirement.

19 So if you look at battalion chief, you'll look
20 at the average in 2002 is 44,000. Then in 2003 it was
21 104.

22 Again, why do you see such variations? It's
23 going to be because of the number of battalion chiefs.
24 It's a smaller rank, how many retired that particular
25 year, and what their average sick leave payout is.

1 THE WITNESS: Sure.

2 THE ARBITRATOR: And, so, there's no separate
3 contribution that goes beyond the original funds that
4 went in there, as I understand.

5 THE WITNESS: But, the City is a guarantor of
6 last resort, which is important to remember in a pension
7 fund.

8 When you have a defined pension plan, let's say
9 the funds are not managed well, and let's say we're not
10 at 100 percent, but we follow the track of a San Diego.

11 The City is very well-aware that if something
12 happens to the pension fund, it's not managed well over
13 a period of years, which if you look at San Diego,
14 that's what happened.

15 They were funded relatively well, and in a
16 several-year period of time, significant things
17 occurred. And -- but, the City is the one who has to
18 guarantee that the checks will be cut, regardless.

19 So it's a very important thing that we always
20 remember. That it is a guaranteed benefit, that the
21 City is the one that has to guarantee will be paid,
22 regardless of fund performance.

23 Q. (By MR. PLATTEN): The SRER is not a guaranteed
24 benefit, is it?

25 A. No, it's not.

EXHIBIT 6

~~COPY~~

IN ARBITRATION PROCEEDINGS PURSUANT TO
SAN JOSE CITY CHARTER SECTION 1111

--oOo--

In the Matter of Arbitration }
 }
 between }
 }
INTERNATIONAL ASSOCIATION OF }
FIREFIGHTERS LOCAL UNION }
NO. 873, }
 }
 Union, }
 }
 and }
 }
CITY OF SAN JOSE, }
 }
 Employer, }
 }
involving contract issues }
in dispute. }
 }

VOLUME I
Pages 1 - 109, inclusive

San Jose, California
December 12, 1990

REPORTED BY
ELIZABETH BLAKE
Certified Shorthand Reporter
(License No. C-1412)
66 Sea Cliff Avenue
San Francisco, California 94121
(415) 668-5195

1 Itelson.

2 STEVEN T. ITELSON,

3 called as a witness by the City, having been sworn by the
4 Reporter, was examined and testified as follows:

5 DIRECT EXAMINATION

6 Q. [By Mr. Whitmore] Would you please state your name
7 for the record?

8 A. Steven T. Itelson.

9 Q. Would you spell your last name, please?

10 A. I-t-e-l-s-o-n.

11 Q. And what is your present occupation?

12 A. I am a Consulting Actuary.

13 Q. And for whom do you work?

14 A. Milliman and Robertson.

15 Q. Prior to that, where were you employed?

16 A. Martin E. Segal Company.

17 Q. While employed by Martin E. Segal, did you do some
18 work for the San Jose Police and Fire Retirement Fund?

19 A. Yes. From 1983 until May of this year

20 MR. PLATTEN: Excuse me.

21 Could you please speak up a little bit?

22 THE WITNESS: Yes.

23 From 1983 until May of this year.

24 Q. [By Mr. Whitmore] Mr. Itelson, earlier we had
25 several references to memos bearing your name when we were

1 reviewing exhibits. Were you the author of those memos?

2 A. Yes.

3 Q. With regard to the Police and Fire Retirement Fund
4 in San Jose, can you describe generally what your duties
5 were with respect to that Fund?

6 A. Yes.

7 My duties primarily were to perform bi-annual
8 actuarial valuations to determine contribution rates, and
9 also to review experience to set new assumptions on which
10 to base the contribution rates. In addition, there were
11 other areas of consulting related to the Retirement
12 Program.

13 Q. With regard to the contribution rates, what was your
14 role with regard to the setting of the rates?

15 A. I would recommend contribution rates based on a set
16 of assumptions and actuarial methods based on the
17 participant data and financial data that we were provided,
18 the plan of benefits and the applicable City Code sections
19 as I understood them.

20 Q. And that would come in the form of a recommendation
21 to the Retirement Board?

22 A. Yes, it would.

23 Q. Then what would happen to the recommendation?

24 A. The Retirement Board would vote on that
25 recommendation.

1 happen to that recommendation to the Retirement Board?
2 Was it adopted?

3 A. In 1985, yes. In 1983, yes.

4 Q. And what action was taken to do that--a vote of the
5 Board?

6 A. I am not really certain. I think the Board voted.

7 Q. Were the contribution rates for both the employees
8 and the City put into effect after your recommendation and
9 whatever action was taken?

10 A. Yes.

11 Q. With regard to the employee rates, to your
12 knowledge, was there ever a different rate for Police
13 employees than for Fire employees?

14 A. Not to my knowledge. Not since 1983.

15 Q. There has been some discussion here, which you may
16 be able to improve upon, as to the ratio of contributions
17 between the City and the employees and other factors that
18 somehow determine what the ultimate rates are by the City
19 and the employees. First, will you describe the 8-to-3
20 ratio? What is it and how does it work?

21 A. The interpretation of the City Code that we were
22 given was that "current service cost" meant the cost of
23 the Plan for new employees or new participants, and that
24 cost was split in an 8-to-3 ratio. But contributions at
25 that level in the future, together with the assets at that

1 point in time, would not cover the cost of all the
2 benefits. This is the so-called unfunded liability.
3 Whether it is called USVP or UAL or some other actuarial
4 term, the City is fully responsible under the Code for
5 payment of that unfunded liability.

6 In 1984, retiree medical benefits were added to the
7 Plan. My understanding is that the parties bargained to
8 split that contribution rate 50-50. A hybrid funding
9 method was adopted called ten-year, rolling-term funding.

10 This methodology is unique. Most retiree medical
11 plans are not funded. They are paid on a pay-as-you-go
12 basis. This methodology gave partial funding and reflected
13 the fact that the benefits are bargained and do change
14 from time to time.

15 In 1985, effective for 1986, somewhere in that
16 period, a dental plan was also adopted. The split of the
17 contributions there, which was .25 to .08, was done
18 primarily, I believe, to recognize that the employee rate
19 would have dropped by .08. Therefore, it was most
20 convenience to split it with the employees only paying .08
21 and leaving their contribution as it stood.

22 Dental is funded on the same rolling ten-year-fund
23 basis as the retiree medical.

24 Q. As I understand it, you have described three
25 different ratios or relationships between the City and the

EXHIBIT 7

CITY OF SAN JOSE - MEMORANDUM

TO: Robert E. Osby
Fire Chief

FROM: Leslie R. White

SUBJECT: QUESTIONS FROM FIRE
PERSONNEL

DATE: November 16, 1990

APPROVED

DATE

I recently received several questions regarding issues important to Firefighters. The questions were sent to Cityline, but since they pertain mainly to Firefighters, I am choosing to respond directly.

Many of the questions received were very similar, therefore some responses were combined.

Please share this information with your employees.



Leslie R. White
City Manager

Cityline Questions

11/9/90

In September we received a number of Cityline questions from San Jose firefighters. Since the questions pertain to fire personnel only, I am responding through Chief's Chat. Several of the questions were duplicates, and so I am responding to them jointly.

Benefits Issues:

Why doesn't the City dental plan cover orthodontia? Why don't Firefighters have better dental coverage?

The City offers two separate dental programs for all benefited employees; prepaid and Delta Dental. We have been studying the issue of dental and orthodontia benefits for use in recent negotiations, and we have found that the City has a program that is comparable with other local and statewide agencies. This does not mean that the City is not interested in modernizing our benefits. We use the Benefits Review Forum to change Citywide benefits (such as recent changes in health plans) and will bring this issue to that group to ensure the City offers the best dental package available for the money.

Why do some Departments have eye care and some do not?

Employees within departments belong to different bargaining units, and therefore have different benefits. Of the six employee bargaining groups, only one (OE#3) has an eye care benefit, provided through the OE#3 Local Benefits fund, and not administered by the City. This benefit was negotiated many years ago, and OE#3 members have chosen reduced benefits in other areas to retain this benefit.

Why are Battalion Chiefs and Management exempt from Drug Testing?

Battalion Chiefs are bound by the same substance abuse provisions as all other IAFF members. All management employees of the City of San Jose have their own substance abuse program, including drug testing for cause. The rehabilitation benefit for management is similar to, but not as generous as that provided for members of IAFF.

Sick leave is earned through negotiations. Why are employees penalized for using sick leave? Why not pay off all unused sick leave?

Sick leave is provided for employees who become ill, and are unable to work or who are required to care for sick dependents. It is provided for illness and injury, not for supplemental paid leave, which is why the City requires medical verification of illness or injury.

The City provides very generous sick leave pay off upon retirement which is designed as an incentive to reduce utilization. It currently provides a benefit equal to, or more generous than other jurisdictions.

Cityline Questions
11/9/90

Retirement Benefits Issues

Why weren't additional benefits added to the Police and Fire retirement system when the contribution rates were lowered?

The City of San Jose Police and Fire Retirement System is a defined benefit plan, meaning that no matter what the actuarial experience (whether rates go up or down) the employees will continue to receive the benefits promised in the Municipal Code. When the cost of providing benefits goes up, and the benefits must be paid for, the City pays 100% of the unfunded liability (the amount not covered by contributions). When the actuarial rates were set last Spring, the actuarial experience was favorable, and the cost of providing the defined benefits went down, so contribution rates for both the City and the employee were reduced.

The City and IAFF are currently negotiating, and the City will entertain retirement benefits that are actuarially sound. Costs for adding retirement benefits will be calculated as part of the total compensation change negotiated for this contract. IAFF brought employee concerns and past problems to the attention of the administration, and after several meetings and studies by the Board actuary, we believe that we can recommend a new method to allow retirement benefit enhancements (See below)

Why don't you support tripartite retirement negotiations (with Police and Fire together?)

This matter will soon be before the arbitrator. The City has taken the position that tripartite negotiations may be a suitable solution to the retirement benefits issue. We propose that the City, IAFF and the POA get together to negotiate a proper method to handle retirement benefit enhancements, which may mean separate benefits for Police and Fire within the same retirement fund.

Why do Police Officers have different benefits than Firefighters?

Police and Fire have defined benefits, which are currently exactly the same. The only difference is that POST pay is included in the calculation of final compensation for retirement. Police Officers make retirement contributions based upon the higher base pay.

Why do survivors only receive 37 1/2 % of base pay?

As part of the City's defined benefit program, survivors receive 37 1/2% of the base salary their spouse is earning at time of his or her death. This amount of survivorship is a defined benefit. Remember that 37 1/2% of base pay is equal to 50% - 75% of what the employee would have received in pension had the person retired (Years of service x 2.5%). This survivor benefit is more than most other jurisdictions surveyed.

Do you support alternate employment for disability retirees with less than 20 years of service?

Yes, I do support alternate employment, in fact, we are adding several new staff positions in the Retirement and Benefits staff in order to enhance this program. Alternate employment allows disabled personnel to rehabilitate within the City of San Jose, and continue on as active members of the City team.

Cityline Questions
11/9/90

Why don't retirees get more than just a pin? Why not a watch?

The City of San Jose has historically provided pins to all City employees to represent their time in service to the City. We do value long term employees, and believe that these pins represent the City's appreciation for their valuable contribution. As you know, the Fire Department uniforms also have Maltese crosses and stripes to represent years of service and rank.

It is very appropriate for co-workers and union representatives to give other gifts and celebrations for retirees. I have attended several of these celebrations, and am impressed with the gratitude expressed by co-workers. Unfortunately, any gift for years of service would have to be given to all retiring employees, and the cost would be prohibitive.

Staffing Issues

Why don't you support additional staffing levels for downtown fire stations? Why do you support an intern program which takes people away from minimum staffing?

I am supporting additional fire suppression staffing in the form of two companies for Fire Station 28. Additionally in the current budget, we approved additional downtown staffing with Engine 101, additional personnel on trucks 1 and 3, and 2 additional firefighters on the HIT unit.

We have committed to continually review not only downtown staffing needs, but staffing needs for the neighborhoods as well, and when deemed appropriate, we will recommend additional resources.

The intern program has proven to be a valuable way to provide experience and insight to interested suppression personnel, and assist them with personal and professional growth. These staff members can be reached should an emergency arise that would require their assistance.

Why don't we have separate bathroom and bedding facilities in the fire service for the opposite sex?

The Fire service is becoming more diverse, and Fire administration is continually working to resolve privacy issues resulting from the joint use of living quarters by both men and women. Most stations were designed before women were an active part of the fire service, and do not have private and separate facilities. As new fire stations are developed, there is more flexibility to design separate quarters, but for the time being, the steps that have been taken such as partitions and signage signifying restroom use by male or female will be continued.

Cityline Questions 11/9/90

Many Fire houses are in dire need of maintenance. Why does the City take so long to repair these stations? These are where we live. Would you let your house be maintained this way? Firefighters have poor living conditions.

I spoke to Jim Daniels, the Director of General Services regarding this issue, and Jim assured me that all work orders received by Building Maintenance that have to do with Fire Station health and safety issues are automatically handled as first priority, either with in house personnel or by contract. As with many other departments, General Services does not have all the Building Repair and Maintenance staff they need, and the budget will not allow these additions in the near future.

I realize that Firefighters do spend a great deal of time in Fire Stations, and realize that many firefighters go the extra mile to ensure that small problems are repaired without a work order.

Miscellaneous Issues

Why don't you support the rule of 3 instead of the promotional rule of 10?

One look at the qualified and exceptional workforce we are attracting and promoting, and the value of a rule of ten is obvious. Often as little as one point can separate eight or nine candidates. Candidates with the exact same score are ranked randomly by the computer. Given the fact that rankings on a list are so close, the Chief needs the discretion to choose from among several close ranking candidates to find the ones who would be the best for the job. The rule of ten offers more people the opportunity to be selected, and has worked very well for the City of San Jose.

Why did you not support the right of a former City employee to sit on Boards or Commissions?

The City Charter defines the balance of representation and the degree of Council flexibility in Civil Service appointments. The recent Council policy simply said identified how the Council will apply their charter defined discretion so as not to upset that balance. I support the Council's decision, because the reason that the Civil Service Commission exists is to ensure that decisions of the administration on employee discipline and personnel matters will be reviewed by an unbiased Board. I believe that a former City employee may have alliances and relationships that make it difficult to provide an unbiased view of a problem, which would be detrimental to the employee hoping for an unbiased perspective on their problem.

Could you support beards for Firefighters?

The personal grooming standards for the Fire service is based on concerns regarding appearance and safety. We understand that breathing apparatus would not fit properly with beards or extreme facial hair, and therefore would not be appropriate for the fire service.

Civiline Questions
11/9/90

Why doesn't the City provide an attorney to represent employees at Civil Service Hearings?

I believe that you are suggesting something like a public defender for the City employee, hired by the City, to represent the employee against another City Attorney. I do not believe that this would be cost effective or readily accepted by the employee. Through bargaining groups, many employees have representation available through the Union officials. Providing a City Attorney to represent the City, but not the employee is the common practice of comparable agencies. We have not heard this complaint or suggestion before.

Would you support subordinates evaluating supervisors on a yearly basis?

Each City employee is evaluated annually by their supervisor and that supervisor may take into account the individual's relationships with subordinate employees. I encourage supervisors to have their subordinates give them feedback in those evaluation sessions.

Why can't EMT training be for only 6 weeks, like it was years ago? Now it takes a year.

The training provided for EMT certification is mandated by the state, and the City complies with these requirements in the most feasible and economic manner.

Received
MAY 06 2013
meyers/nave

**WYLIE, MCBRIDE,
PLATTEN & RENNERT**

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